CASE NO. 12-3491

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWNER-OPERATOR
INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMERICA BANK

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Ohio,
Case No. 2:05-cv-00056 (Marbley, J.)

PLAINTIFFS-APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 Appellee Owner-Operator Independent Drivers Association, Inc. states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

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STATEMENT AS TO ORAL ARGUMENT

Plaintiffs believe that oral argument will not enhance this Court's ability to dispose of Comerica's appeal. Five of the six issues raised by Defendant-Appellant Comerica Bank on this second appeal in this matter are foreclosed by the mandate in *In re Arctic Express, Inc.*, 636 F.3d 781 (6th Cir. 2011)(*"In re Arctic Express I")*. The sole issue remanded to the district court was to determine, as a matter of fact, "whether Plaintiffs exercised reasonable diligence in discovering facts giving rise to the claim against Comerica." *Id.* at 802-03. Whether the district court committed clear error in its findings of fact is a simple matter adequately addressed in the written submissions and the full record of this matter. No oral argument is necessary on this appeal.

STATEMENT OF THE ISSUES

1. The issue of the amount of damages awarded on Final Judgment was actually litigated and decided on summary judgment prior to the first appeal. *OOIDA v. Comerica Bank*, 615 F. Supp. 2d 692 (S.D. Ohio 2009) ("2009 Judgment"). This Court affirmed the district court's finding that the amount in trust property wrongfully transferred to Comerica pursuant to the loan agreements between Arctic Express Inc. and Comerica Bank was $5,583,084. *In re Arctic Express, Inc.*, 636 F.3d 781, 788, 801 (6th Cir. 2011)(*"In re Arctic Express I")*. Does the mandate rule foreclose relitigation of the issue of damages on this appeal?

2. The issue of the retroactive application of the Interstate Commerce Commission Termination Act of 1995 was actually litigated and decided on summary judgment prior to the first appeal. Comerica raised the issue on the first appeal of this matter, but made no argument based upon this issue. Does the mandate rule foreclose relitigation of the issue of the retroactive application of the ICCTA on this appeal?

3. The mandate in *In re Arctic Express I*, remanded this matter for a factual determination as to "whether Plaintiffs exercised reasonable diligence in discovering facts giving rise to the claim against Comerica." Did the district court commit clear error when it determined as a factual matter that Comerica failed to meet its burden to prove that Plaintiffs did not exercise reasonable diligence in discovering the lending relationship between Arctic and Comerica prior to the statute of limitations cutoff date of January 16, 2000?

4. Did the district court abuse its discretion in determining that the Prime rate, the prevailing market rate, was the appropriate rate to calculate the award of prejudgment interest necessary to make Plaintiffs whole?

STATEMENT OF THE CASE

The history of this matter has been well documented. As the district court succinctly noted in entering Final Judgment, the material facts underlying this lawsuit have been memorialized in at least eight published opinions since it began,

now over sixteen years ago. (Final Judgment, ECF No. 155, PageID#7508 and n. 1). Plaintiffs refer this Court to its recitation of the underlying facts and procedural history found in *In re Arctic Express I*, 636 F.3d at 785-791.

A. The Mandate in *In re Arctic Express I*

The mandate in *In re Arctic Express I*, conclusively determined: (1) The escrow provisions of the truth-in-leasing regulations, 49 C.F.R. § 376.12(k), through the comprehensive delineation of responsibilities, impose strict fiduciary obligations on motor carriers which place them in a position of trust with respect to owner-operators and the handling of their escrow funds; (2) The historical context in which the regulations were enacted, coupled with the strict requirements of their terms, create a statutory trust for the benefit of owner-operators; (3) A third party transferee of trust property takes the property subject to the trust, and must disgorge the trust property, or the proceeds from the property, to the beneficiaries of the trust; (4) Arctic breached its trust duties to Plaintiffs by failing to draw on its line of credit with Comerica, to return Plaintiffs' maintenance escrows as required by the truth-in-leasing regulations; (5) Under the loan agreements between Arctic and Comerica, Comerica collected Plaintiffs' trust property by sweeping Arctic's cash collateral account, and used the trust property to reduce Arctic's loan balance; (6) Comerica is liable to Plaintiffs to disgorge Plaintiffs' trust property received in

breach of the trust, in the amount of $5,583,084, unless it can establish a viable defense; (7) Comerica is not a bona fide purchaser for value.

This Court affirmed the district court's finding that material issues of fact existed with respect to Comerica's statute of limitations defense. *In re Arctic Express I*, 636 F.3d at 802. This Court held that the federal discovery rule applies to the accrual of Plaintiffs' claim. Under the federal discovery rule, the statute of limitations does not begin to run "until the plaintiff discovers or, with reasonable diligence, should have discovered, the acts constituting the alleged violation." *Id.* Reasonable diligence is a factual question reserved for the trier of fact. *Id.* at 802-03. Accordingly, this Court remanded one issue to the district court -- a factual determination as to "whether Plaintiffs should have known of the need for inquiry into Arctic's relationship with Comerica over four years before Plaintiffs brought this suit, and therefore whether Plaintiffs' claims are barred by the statute of limitations." *Id.*

B. Statement of Facts Relevant to the Statute of Limitations Defense

Plaintiffs Carl Harp and Michael Wiese are truck owner-operators who leased their equipment and services to motor carrier Arctic Express, Inc. (Final Judgment, ECF No. 155 PageID#7516, 7518). Plaintiffs' lease and lease/purchase agreements provided for creation of a maintenance account funded by collection of nine cents per mile from owner-operator compensation, and for the disbursement

of funds from the maintenance account to pay for repairs to the trucking equipment. (*Id.*). Plaintiffs understood that an account would be held for their benefit and that repairs on their equipment would be paid from their funds. (*Id.*). Plaintiffs' settlement statements from Arctic accounted for amounts deducted and total amounts accrued for each driver's maintenance fund. (*Id.*). The agreements stated in unambiguous terms that all accrued amounts in the maintenance fund would be forfeited if the driver did not complete the lease term. (*Id.*, PageID#7519). Plaintiffs concluded, based on the agreements, settlements, and complaints from members, that Arctic/D&A were in violation of the truth-in-leasing regulations. (*Id*.) Plaintiffs relied on this information to file the original Complaint in the Arctic Litigation. When the Complaint was filed, Plaintiffs were familiar with Arctic, its operations and the condition of its equipment, and believed Arctic/D&A to be viable and solvent. (*Id.*, PageID#7526-27). Plaintiffs' knowledge of Arctic/D&A included no fact which would have raised concern regarding the motor carrier's financial condition, as drivers were not reporting that repairs to their trucking equipment went unpaid, or that settlement checks were not being honored. (*Id.*).

Carl Harp received a compensation check from Arctic in 1994. (Final Judgment, ECF No. 155 PageID#7516). The check identifies Comerica as the issuing bank. *Id.* The check does not disclose the existence of a debtor-creditor

relationship between Arctic and Comerica or that Comerica had control over Mr. Harp's escrow funds. (*Id.*, PageID#7517).

Prior to January 16, 2000, there was no information on the public record which would have revealed the financing arrangement between Arctic and Comerica. (*Id.*, PageID#7513-14, 7521). In 1991, Comerica filed a UCC financing statement showing that it had a secured interest in G&D's "accounts receivable." (*Id.)*. None of Arctic's loan agreements, security agreements or the Revolving Credit Loan Agreements was publicly filed. (*Id.*, PageID#7514). The UCC statement does not identify the type of secured interest. (*Id.*). The UCC filing does not identify any interest in "escrow funds" or "maintenance escrow funds." (*Id.*, PageID#7514). The UCC filing provides no information regarding any loan arrangement much less the operation of such loan. (*Id.*, PageID#7553-54). The interest in "receivables" does not reveal that Arctic drew on its line of credit only to fund its net obligations, leaving driver maintenance escrows with Comerica as a reduction of Arctic's loan balance. (*Id*). Comerica's own witness at trial testified that he did not believe that the maintenance escrow funds were included with Arctic's account receivables, or were eligible accounts under the loan agreements. (*Id.*, PageID#7514).

There is no evidence in the record that shows that any public records search or lien search would have revealed any fact which would have provided

information regarding Arctic's finances or financial arrangements, including a Dun & Bradstreet report. No Dun & Bradstreet report was submitted into evidence. (*Id.*, PageID#7521, 7526 n. 9).

Plaintiffs served detailed discovery requests directed toward Arctic's financial information, but were prevented from obtaining the requested information and documents by district court orders restricting discovery in the Arctic Litigation. (*Id.*, PageID#7523). In December 1997, the court entered an Order limiting discovery to "class issues." (*Id.*, PageID#7523, 7528). As a result, Plaintiffs were barred from seeking merits or damages discovery. (*Id.*). A second discovery order in June 1998 further limited permissible discovery to interrogatories on the number of putative class members and documentation of lease agreements, lease/purchase agreements and settlement sheets for a sample of 36 drivers. (*Id.*, PageID#7524). The district court stayed all proceedings in the Arctic Litigation on August 17, 1998. (*Id.*, PageID#7528). The stay remained in force until March 2000, two months after the January 16, 2000 statute of limitations cut-off date. (*Id.*, PageID#7528, 7557-58).

SUMMARY OF THE ARGUMENT

Comerica states six issues for review by this Court on this second appeal in this matter. Five of the six issues are foreclosed from Comerica's challenge in whole or in part by both this Court's rulings in *In re Arctic Express I* and the

limited remand to the district court; and by Comerica's waiver of issues which could have been raised in the appeal of the 2009 Judgment, but were not.

The district court correctly interpreted the mandate and denied Comerica's contention that the amount in damages was an issue remanded for trial. Contrary to Comerica's strident protestations, it did in fact have repeated opportunities to challenge the amount in damages ultimately awarded in Final Judgment. The original Complaint against Comerica specifically stated that Plaintiffs would seek recovery **from Comerica** for the amount in maintenance funds found to have been unlawfully withheld by Arctic and wrongfully transferred to Comerica under the loan agreements. Comerica had actual notice that Plaintiffs and Arctic were negotiating a settlement while negotiations were proceeding. Comerica had actual notice that settlement had been reached and that Plaintiffs would seek to hold Comerica responsible for return of the maintenance escrow funds. The grievances now raised by Comerica on this appeal were raised on summary judgment and decided by the district court in the 2009 Judgment. The district court held that if Plaintiffs' trust property was found to have been transferred to Comerica, Comerica would be liable for the entire $5,583,084. That Order was appealed and affirmed in relevant part in *In re Arctic Express I*. Comerica failed to raise the issue on the first appeal. The mandate rule forecloses relitigation of the issue of damages on this appeal.

This Court remanded this matter to the district court for a factual determination as to Plaintiffs' reasonable diligence in discovering the claim against Comerica. Comerica's entire submission is based on a mischaracterization of the claims involved. Contrary to its insistence throughout its Brief, Comerica is not held responsible for Arctic's violation of the truth-in-leasing regulations. Comerica is liable for its own conduct in the wrongful transfer of Plaintiffs' trust property under the loan agreements. Plaintiffs' knowledge that Arctic failed to return their escrow funds as required by the leasing regulations, says nothing about their diligence in seeking information about Arctic's financing arrangements. In fact, as found by the district court, when the claims against Arctic were filed in 1997, Plaintiffs' diligence was rightly directed toward proving the truth-in-leasing violations and protecting the newly granted private right of action. When information relating to driver investigation into Arctic's maintenance fund retention practices put Plaintiffs on inquiry notice as to the security of their funds, Plaintiffs engaged in reasonable and timely efforts to learn about Arctic's finances through normal discovery channels. Plaintiffs' efforts were frustrated, through no fault of Plaintiffs, by court orders limiting discovery and ultimately by a stay of all proceedings which was not lifted until after the statute of limitations cutoff date. Comerica does nothing more than offer a strident and repeated assertion that Plaintiffs engaged in no diligence whatsoever. Comerica never supports that

allegation with any fact or event which would demonstrate that the district court committed clear error in concluding that Plaintiffs did not lack diligence in the discovery of their claims. The district court did not err in concluding that Comerica failed to carry its burden on its statute of limitations defense.

This Court should affirm the Amended Final Judgment in favor of Plaintiffs in the amount of $5,583,084 in damages plus $2,647,330.62 in prejudgment interest.

ARGUMENT

I. STANDARD OF REVIEW

The interpretation of the mandate of a prior appeal is a legal issue which this Court reviews *de novo. United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003); *United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997). On appeal from a bench trial, this Court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. *MACTEC, Inc. v. Bechtel Jacobs Company, LLC,* 346 Fed. Appx. 59, 69 (6th Cir. 2009). Comerica's contention that there are mixed questions of law and fact which allow *de novo* review of the district court's factual findings is incorrect. (ECF No. 155). This matter was remanded to the district court for a factual determination on the issue of whether Plaintiffs exercised reasonable diligence in discovering their claim. *In re Arctic Express I*, 636 F.3d at 802-803. Accordingly, the district court's factual findings on

Comerica's statute of limitations defense are reviewed for clear error. MACTEC, 346 Fed. Appx. at 69.

II. THIS COURT'S MANDATE IN *IN RE ARCTIC EXPRESS I* LIMITED THE REMAND AND THIS APPEAL TO FINDINGS OF FACT RELATED TO COMERICA'S STATUTE OF LIMITATIONS DEFENSE

A. The Mandate Rule

This Court has defined the mandate rule as having two components: (1) the limited remand rule, which arises from action by an appellate court; and (2) the waiver rule, which arises from action (or inaction) by one of the parties. *O'Dell*, 320 F.3d at 679. The Court explained:

> The mandate rule "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.

Id., quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001); *United States v. McCreary-Redd*, 407 Fed. Appx. 861, 871 (6th Cir. 2010).

1. The Limited Remand

Under the first component of the mandate rule, a lower court may not consider issues that the mandate has laid to rest. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). "The basic tenet of the limited remand component of

the mandate rule is that 'a district court is bound to the scope of the remand issued by the court of appeals.'" *O'Dell*, 320 F.3d at 679, citing *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999). The mandate rule instructs that the district court is without authority to expand its inquiry beyond the matters forming the basis of the appellate court's remand. *Campbell*, 168 F.3d at 265. "In essence, the mandate rule is a specific application of the law-of-the-case doctrine;" *Id.* and has been characterized as a "more powerful version" of the law-of-the-case doctrine. *La Shawn v. Barry*, 87 F.3d 1389, 1393 and n. 3 (D.C. Cir. 1996)(*en banc*); *Doe v. Chao*, 511 F.3d 461, 464-65 (4th Cir. 2007).

The mandate rule serves the interest of finality. *O'Dell*, 320 F.3d at 679 Repetitive hearings, followed by additional appeals, waste judicial resources and place additional burdens on the judicial system. *Id.* Accordingly, the scope of the mandate must be viewed in the context of the entire appellate decision. *Campbell*, 168 F.3d at 266. The scope of the mandate is limited by specific dictates of the remand order as well as the broader "spirit of the mandate" which takes into account "the appellate court's opinion and the circumstances it embraces." *O'Dell*, 320 F.3d at 680; *Ben Zvi*, 242 F.3d at 95. The limit of the mandate "must be read with the analysis offered in the [appellate] opinion." *O'Dell*, 320 F.3d at 681. The mandate must be interpreted considering the context of the entire opinion, with the relevant language appearing anywhere in the opinion. *Campbell*, 168 F.3d at 267.

The court's silence on an argument implies that it is not available for consideration on remand. *United States v. Husband,* 312 F.3d 247, 251 (7th Cir. 2002). An appellate court's affirmance with respect to remaining issues presumes that the court considered the issues and determined them to be unworthy of discussion. *Allapattah Services, Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1364 (S.D. Fla. 2005). An appellate court's ruling "is issued after due consideration of the merits of the appeal, and the judgment entered determines, either explicitly or implicitly, all issues raised in the appeal." *Id.*, citing *Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983).

The limit of the mandate encompasses issues decided both expressly and impliedly by the appellate court or a previous trial court. *Campbell*, 168 F.3d at 265. Determinations of the court of appeals are binding on both the district court on remand and the court of appeals upon subsequent appeal. *Campbell*, 168 F.3d at 265, citing *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994).

2. The Waiver Rule

With respect to the second component of the mandate rule, "this court has consistently held that 'a party that fails to appeal an issue waives his right to raise the issue before the district court on remand or before this court on appeal after remand.'" *McCreary-Redd,* 407 Fed. Appx. at 870, quoting *JGR, Inc. v. Thomasville Furniture Indus., Inc.,* 550 F.3d 529, 532 (6th Cir. 2008). The law-of-

the-case doctrine thus "bars challenges to a decision made at a previous stage of litigation which could have been challenged in a prior appeal, but were not." *Id.* Any issue that could have been but was not raised on appeal is waived and thus not remanded. *Husband*, 312 F.3d at 250. "Parties cannot use the accident of remand as an opportunity to reopen waived issues," nor "use the accident of a remand to raise in a second appeal an issue that he could just as well have been raised in the first appeal." *Id.* at 251. *See also Barrow v. Falck*, 11 F.3d 729, 730 (7th Cir. 1993) ("An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand and used as a reason to disregard the court of appeals' decision.").

The Second Circuit explained the rationale of the waiver rule:

> Under [this rule], a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision, for it would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.

Ben Zvi, 242 F.3d at 96. The scope of the issues foreclosed on remand and subsequent appeals is determined by the scope of the judgment first appealed, not by the issues raised by the litigants in argument. *Engel Industries, Inc. v. Lockformer Company*, 166 F.3d 1379, 1382 (Fed. Cir. 1999). Unless remanded by the appellate court, all issues within the scope of the appealed judgment are

deemed incorporated within the mandate and thus are precluded from further adjudication. *Id.* at 1383, citing *Crick v. Smith*, 729 F.2d 1038, 1039-40 (6th Cir. 1984) (among cases cited).

B. The Mandate in *In Re Arctic Express I* Forecloses Reconsideration of this Court's Conclusive Determination of Recoverable Damages from Comerica

The mandate in *In Re Arctic Express I* includes the findings and conclusions, explicit and implicit, in this Court's opinion on the first appeal. Additionally, the mandate includes all issues within the scope of the judgment at issue on the first appeal which could have been raised in the first appeal. The judgment on the first appeal includes: the district court's Opinion and Order on Summary Judgment, *OOIDA v. Comerica Bank*, 615 F. Supp. 2d 692 (S.D. Ohio 2009); and all the prior rulings of the district court deemed merged into that judgment ("2009 Judgment"). As recognized by Comerica, "all preliminary rulings by the district court merge into the district court's final judgment and are reviewable on appeal. *See* e.g. *Rice v. Liberty Surplus Ins. Corp.*, 113 Fed. Appx. 116, 122 (6th Cir. 2004)" (Brief of Defendant-Appellee Comerica Bank, Appeal No. 09-3463, page 32).

Final Judgment entered by the district court correctly concluded that this Court's holding in *In re Arctic Express I* "conclusively established the issue of recoverable damages against Comerica at $5,583,084." (ECF No. 155 PageID#7511).

1. Comerica Waived Its Right to Challenge the Amount in Damages Awarded to Plaintiffs

The district court correctly interpreted the mandate and denied Comerica's contention that the amount in damages was an issue remanded for trial. (Order, ECF No. 84, Page ID#2245-47; Order, ECF No. 152, PageID#7436-38). The district court did not err in awarding Plaintiffs base damages in the amount of $5,583,084. (Final Judgment, ECF No. 155, PageID#7564).

Contrary to Comerica's argument, during proceedings prior to remand, Comerica had a full opportunity to challenge the amount in damages claimed by Plaintiffs. In fact, the precise arguments raised by Comerica on this appeal were raised prior to remand, actually litigated, and were decided by the district court in the 2009 Judgment. Comerica did not cross appeal the 2009 Judgment; and although it challenged certain of the holdings in the 2009 Judgment, Comerica failed to raise the issue of damages in the first appeal. This Court affirmed the district court's finding that the $5,583,084 award in damages was the amount in trust property wrongfully transferred to Comerica. Having failed to raise the issue of damages on the first appeal, Comerica waived the issue on remand, and before this Court on this second appeal.

Comerica raised on summary judgment the issue of whether it could be held liable for the amount of the Arctic Judgment (Comerica S.J., ECF No. 54, PageID#385, 389, 395-96; Comerica Reply S.J., ECF No. 61, PageID#1880-81).

Plaintiffs responded with a detailed showing establishing that the amount awarded in Judgment reflects the amount in unused maintenance escrows wrongfully transferred to Comerica. (Plaintiffs Opp. to Comerica S.J., ECF No. 58, PageID#1741-42, 1744-45). Plaintiffs further established that Comerica had actual notice of the pending settlement in the Arctic Litigation at a time when it had already been served with the Complaint in this action and knew that Plaintiffs would seek restitution to recover the Judgment amount from Comerica. Comerica had actual notice of the methodology and total amounts in escrow and interest calculated. (*Id.* at PageID#1745-48).

The district court rejected Comerica's challenge to the Arctic Judgment amount in the 2009 Judgment:

> This Court has already determined in this action that the maintenance escrows are trust property. 540 F.Supp. at 927; 2006 WL 1339427, at *4. ***The entire amount of trust property was determined in the Arctic Litigation to be $5,583,084***, which is the amount of maintenance escrows plus interest that Arctic owed to the Class. If this Court determines that the maintenance escrows were included in the Arctic account with Comerica, and if this Court determines that Comerica withdrew funds from that account in breach of trust, then ***Comerica would be liable for the entire amount of trust property*** (provided Comerica is not a bona fide purchaser).

OOIDA v. Comerica, 615 F. Supp. 2d at 703-04 (emphasis added).

This Court reversed the district court's findings on the two conditions set out by the district court for the recovery of the entire amount of trust property. *In re Arctic Express I* found that Plaintiffs' trust interest in the maintenance escrows

attached when Arctic's accounts receivable were deposited in the cash collateral account with Comerica. 636 F.3d at 801. Further, this Court held:

> By operation of the loan agreements, Comerica collected the nine cents per mile in maintenance escrows along with Arctic's receivables and, in sweeping Arctic's cash collateral account, used the maintenance escrows to repay amounts borrowed by Arctic under the loan agreements. Consequently, Arctic breached its trust obligations to plaintiffs by encumbering the escrow funds, and dissipating the trust assets, through its lending relationship with Comerica. ***Comerica must therefore disgorge the trust property*** received in breach of trust . . . .

Id. (citation omitted, emphasis added).

On remand the district court rejected Comerica's attempt to relitigate the issue of the amount of damages, and correctly interpreted this Court's specific mandate:

> To reiterate, this Court held that there were two prerequisites for holding the Defendant liable for the full $5,583,084. . . . The Sixth Circuit subsequently held that both of these conditions existed as a matter of law. *In re Arctic Express, Inc.*, 636 F.3d at 801. The question of the amount of damages that the Defendant owes to the Plaintiffs has therefore already been determined, and the only question remaining for trial is the Defendant's statute of limitations defense.

(Order, ECF No. 84, PageID#2247; *See also* Order, ECF No. 152, PageID #7435, 7438 ("With respect to the damages issue, the panel found that 'the particulars of Arctic's banking relationship with Comerica were accurately explained by the district court,' and thus Comerica 'must therefore disgorge the trust property received in breach of trust…. 636 F.3d at 788, 801'").

The issue of the amount of damages was fully litigated and decided in the 2009 Judgment. Comerica failed to raise the issue of damages on the first appeal. The district court correctly interpreted the mandate of *In re Arctic Express I* as affirming its holding that Comerica would be liable to Plaintiffs for the full $5,583,084 given the conditions this Court found satisfied by operation of the loan agreements between Arctic and Comerica. In short, Comerica waived further consideration of the amount of damages on remand and on this appeal.

2. Comerica Has Waived Its "Issue Preclusion" Argument

Comerica contends that by finding it liable for an amount which equals the amount of the Arctic Judgment, it is unfairly being held responsible for Arctic's wrongdoing. From that mischaracterization of the holdings of this Court and the district court, Comerica argues that issue preclusion cannot be applied here because it was not a party to the Arctic Litigation, and it had ***no opportunity*** to challenge the calculation of the amount in damages. Comerica is wrong in its characterization of the damages awarded. Further, Comerica has misstated the record surrounding the settlement of the Arctic Litigation.

(a) Comerica Was Held Responsible for Its Own Wrongdoing

Comerica has consistently confused its liability for the wrongful transfer of Plaintiffs' trust property, with Arctic's liability for violation of the escrow provisions of the truth-in-leasing regulations. Comerica must pay the $5,583,084

amount of the Arctic Judgment not because Comerica was held responsible for Arctic's failure to return Plaintiffs' maintenance escrow funds in violation of 49 C.F.R. § 376.12(k)(6); but because Comerica wrongfully took the escrow funds -- Plaintiffs' trust property -- from Arctic's accounts. The 2009 Judgment, affirmed by this Court in *In re Arctic Express I*, already conclusively determined Comerica's challenge here:

> This court has already held that it had jurisdiction to order restitution of trust property "whether it is in the hands of the original wrongdoer or in the hands of a subsequent transferee." 2006 WL 1339427 at *7(citing *Harris Trust & Savings Bank v. Salomon Smith Barney*, Inc., 530 U.S. 238, 250-51 (2000).

OOIDA v. Arctic Express, 615 F. Supp. 2d at 703. This Court in affirming the district court's findings, further explained Plaintiffs' rights in their trust property:

> The trustees or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom.

In re Arctic Express I, 636 F.3d at 798, quoting *Harris Trust & Savings Bank v. Salomon Smith Barney*, Inc., 530 U.S. 238, 250-51 (2000). "***Comerica must therefore disgorge the trust property*** received in breach of trust …." *In re Arctic Express I*, 636 F.3d at 801 (emphasis added).

Further, the 2009 Judgment specifically disposed of Comerica's issue preclusion argument, expressly distinguishing between the claims brought against Arctic and those brought against Comerica. "The Arctic Litigation resolved issues

regarding the rights and obligations relating to the maintenance escrows as between Arctic and the Class. . . . Comerica's liability for restitution of Plaintiffs' maintenance escrows is based solely on its own conduct." *OOIDA v. Arctic Express*, 615 F. Supp. 2d at 703. The district court found:

> Comerica's liability for the restitution of Plaintiffs' trust property will be determined by this Court's rulings, in the instant action, as to the operation of the loan agreements and Comerica's diligence in inquiring about the nature of funds on deposit in Arctic's accounts with Comerica.

Id. at 702. The district court concluded that it was "not aware of any case that applies collateral estoppel to preclude a plaintiff from recovering trust property after an alleged wrongful transfer to a subsequent transferee.'" *Id.*, quoting *Owner Operator Indep. Drivers Ass'n Inc. v. Comerica Inc.*, 2006 WL 1339427 at *7 (S.D. Ohio May 16, 2006).

(b) Comerica Has Misstated the Record on the Arctic Settlement

Throughout its Appellant's Brief, Comerica asserts that it never had an opportunity to challenge the amount in maintenance escrows found to be accurate by the district court. That assertion is just not true.

Comerica litigated these exact same grievances prior to the first appeal. The 2009 Judgment rejected Comerica's contention on summary judgment that the calculation of the settlement amount in the Arctic Litigation was the result of

collusion intended to artificially inflate the escrows to Comerica's detriment. The district court found:

> In approving the settlement in the Arctic Litigation, this Court determined that the methodology used to calculate the Judgment Amount was appropriate based upon the records maintained by Arctic and D & A. (Prov. Order Approving Stmnt., May 28, 2004). Interest was calculated in accordance with the mandated rates set forth in the truth-in-leasing regulations. (*Id*.) The net balance in maintenance escrows and interest for each Class Member was calculated based upon the methodology approved by this Order. (*Id*.) The measure of damages was calculated by matching lease terms for individual class members to maintenance expenses by truck unit and date. (Arctic Order dated March 15, 2004 at 3-4). On this basis, the total maintenance escrows awarded to the Class was $4,070,190, the total interest awarded was $1,512,894, and the total damages awarded was $5,583,084. (Id.) Therefore, the judgment awarded reflected the amount in unused maintenance escrows which Arctic failed to return to the Class in violation of the Truth-in-Leasing regulations.

OOIDA v. Comerica, 615 F. Supp. 2d at 703 and n.3.

The record on summary judgment in 2009 demonstrates that Comerica had plenty of opportunity to weigh in on the amount of the Arctic Settlement. The record demonstrates that Comerica had actual notice of the proceedings in the Arctic Litigation leading up to the Settlement and entry of Judgment, and Arctic's agreement to cooperate in pursuing claims against Comerica.

The original Complaint against Comerica was filed six months before Judgment was entered in the Arctic Litigation, and sought return of Plaintiffs' maintenance escrow funds in an amount to be determined by final judgment in the Arctic Litigation. The Opposition to Comerica's motion to dismiss the adversary

complaint, **served on Comerica,** stated that final judgment in the Arctic Litigation would be entered after trial "now scheduled for April 19, 2004." (Plaintiffs Opp. to Comerica Summary Judgment, ECF No. 58, Exh. C; PageID##1790-91, 1793). The trial date and settlement discussions in the Arctic Litigation were a matter of public record. (Arctic ECF Nos. 199, 202). Actual notice of the scheduled settlement conference was **served on Comerica** on March 26, 2004. (Plaintiffs Opp. to Comerica Summary Judgment ECF No. 58, Exh. C, PageID#1795, 1798). A Joint Motion filed by Plaintiffs and Comerica, and **served on Comerica** on April 15, 2004, advised the bankruptcy court that the disputes between Arctic and Plaintiffs were near "global compromise" and that the parties expected to reach agreement no later than April 16, 2004, subject to Bankruptcy and District Court approvals (*Id.* Exh. C, PageID#1800, 1802-03). The Bankruptcy Court entered an Order, **served on Comerica,** dated April 20, 2004, vacating the scheduled hearing pending approval by the two Courts of the settlement. (*Id.* Exh. C, PageID#1805, 1808-09). Despite **actual notice of Plaintiffs' intent to pursue their Judgment against Comerica**, and **actual notice of both the trial date on damages, and discussions regarding the impending settlement,** Comerica never sought to intervene or to be heard in the Arctic proceedings.

Further, the publicly docketed Application for Approval of the Settlement, stated the material terms of the agreement, disclosed the claims against Comerica,

and expressly stated the intention to pursue Comerica for the Judgment Amount. (Arctic ECF No. 203). The Application further disclosed that Arctic had agreed to cooperate by providing information and documents related to the claims against Comerica. The Provisional Order approving the Settlement specifically acknowledged the intent to pursue claims against Comerica, noting that Arctic was to be dismissed and Plaintiffs would seek withdrawal of the bankruptcy reference, moving the action to the district court. The Provisional Order gave notice that a public hearing on final approval of the Settlement would be held on July 16, 2004. Comerica never filed an objection to the Settlement, nor did it appear at the hearing to object to the Settlement.

Comerica entered into a Stipulated Order with Plaintiffs in the Adversary Proceeding, dated September 2, 2004, cancelling a scheduled hearing because "in accordance with the terms of the settlement agreement between the Plaintiffs and Debtors, the Plaintiffs will move to withdraw the bankruptcy referral." (Plaintiffs Opp. to Comerica Summary Judgment, ECF No. 58 Exh. C, PageID#1808-09).

The district court correctly interpreted the mandate in *In re Arctic Express I,* denying Comerica's "proffer" related to these assertions:

> Comerica had ample opportunities to contest the damages award in this lawsuit. After Plaintiffs amended their Complaint against Comerica, the methodology of how the Plaintiffs' damages were calculated was subsequently discussed at length by the parties' pleadings and the respective courts, and was actually litigated by Defendant. . . . *Owner-Operator Independent Drivers Ass'n, Inc.*, 615

> F. Supp. 2d at 703, FN 3. . . . The Sixth Circuit affirmed that "[t]he settlement equaled the total amount of maintenance escrow funds, plus interest, owed by Arctic and D&A to the owner-operators," *In re Arctic*, 636 F.3d at 789, and held that Comerica would be liable for that amount, *id.* at 801. . . . In sum, Defendant not only had actual notice of the terms of the settlement between Plaintiffs and Arctic, but it also contested the accuracy of Plaintiffs' recoverable damages against it. The time for disputing the amount of damages in this case has passed. Defendant is correct that Plaintiffs have not been required to prove their damages against Comerica as an evidentiary matter in this case; however, that is a ruling the parties fully litigated and Plaintiffs won in both this Court and the Sixth Circuit.

(Order, ECF#152, PageID##7442-43)

Comerica raised these precise arguments on summary judgment in 2009, and the evidence of Comerica's notice as to proceedings is contained in the record of that matter. The 2009 Judgment rejected Comerica's contentions. Comerica did not raise these issues on the first appeal. Comerica has waived its right to challenge these matters on this appeal.

3. Comerica's Right to Challenge the Retroactive Application of the ICC Termination Act Is Foreclosed by the 2009 Judgment and the Mandate in In re Arctic Express I

Comerica argues in this appeal that the district court's ruling in the Arctic Litigation that the ICC Termination Act ("ICCTA") carried no impermissible retroactive effect was erroneous and improperly allowed numerous Arctic owner-operators a claim against Comerica. Comerica raised these identical issues on summary judgment in 2009. The 2009 Judgment correctly ruled first that the "application of the ICCTA to pre-1996 leases carries no impermissible retroactive

effect." *OOIDA v. Comerica,* 615 F. Supp. 2d at 703, citing, *OOIDA v. Arctic Express,* 270 F. Supp. 2d 990, 995-96 (S.D. Ohio 2003); *See also OOIDA v. Arctic Express*, 288 F. Supp. 2d 895, 901 (S.D. Ohio 2003).

Second, the district court correctly distinguished between the claims against Arctic for violation of the truth-in-leasing regulations, and the independent claims against Comerica for restitution of wrongfully transferred trust property. The district court found that, in this action, Plaintiffs did not sue Comerica under the ICCTA but brought an action for restitution under the federal common law of trusts. *OOIDA v. Comerica,* 615 F. Supp. 2d at 703. Having confirmed its prior rulings that the truth-in-leasing regulations created a statutory trust for the benefit of owner-operator drivers, the 2009 Judgment held that "[t]he nature of Plaintiffs' property interest in their maintenance escrows has been defined by the leasing regulations since 1978. Other than providing a private right of action, the ICCTA does not address owner operator rights under the Truth-in-Leasing regulations." *Id.*

This Court affirmed the district court's holdings. "We agree with the district court and the *Intrenet* court [273 B.R. 153 (S.D. Ohio 2002)] that 49 C.F.R. § 376.12(k), *when viewed in the historical context* in which it was enacted, implicitly creates a statutory trust for the benefit of owner-operators." *In re Arctic Express I,* 636 F.3d at 795 (emphasis added). This Court went on to explain the importance

of the regulatory protections encompassed by the truth-in-leasing regulations to the economic welfare of drivers when enacted in 1979, and concluded:

> These circumstances surrounding the enactment of the escrow regulation reinforce our conclusion that a fiduciary relationship exists between the carrier and the owner-operators, effectively placing the motor carrier in the same position as the trustee of an express trust.

Id. at 796. The nature of Plaintiffs' property interest in their maintenance escrows has been defined by the leasing regulations since 1979. Other than providing a private right of action, the ICCTA did not address owner-operator rights under the truth-in-leasing regulations. The 2009 Judgment affirmed by this Court, correctly held that Comerica was liable to Plaintiffs for the full $5,583,084, not because Arctic was found responsible for that amount under the ICCTA for its violation of the leasing regulations, but because that was the amount of Plaintiffs' trust property that had been wrongfully transferred by Comerica from Arctic's accounts.

Additionally, Comerica raised its instant retroactivity issue on the first appeal, although it made no argument, nor urged any action by this Court. (Brief of Appellee, No. 09-3463 at page 3-4 and n. 1). *In re Arctic Express I* did not directly address Comerica's retroactivity argument. However, this Court recognized the two *Arctic Express* opinions in which the district court held that the ICCTA carried no impermissible retroactive effect. *In re Arctic Express I*, 636 F.3d at 787; and as noted, this Court affirmed the district court's ruling that the truth-in-leasing regulations have since 1979 defined the nature of Plaintiffs' property interest in

their escrow funds as trust property. This Court thus implicitly rejected Comerica's contention that the retroactive application of the ICCTA erroneously inflated the damages for which Comerica is now liable. The mandate in *In re Arctic Express I*, including the 2009 Judgment, has foreclosed Comerica's attempt at a second appeal of the same issue.

4. Comerica is Foreclosed from Introducing Issues on Appeal That It Failed to Raise in the District Court

For the first time in more than nine years of litigation, Comerica asserts that the damages awarded in the Arctic Litigation are miscalculated on an individual driver level. Comerica is foreclosed from introducing this issue on this appeal.

First, as detailed above, the district court determined the amount of damages and the accuracy of the calculation in the 2009 Judgment. In the context of the specific arguments raised by both parties on summary judgment, the district court expressly found the methodology and the calculation of damages to be correct. *OOIDA v. Comerica*, 615 F. Supp. 2d at 703 and n. 3. This Court affirmed that determination. 636 F.3d at 789, 801. Comerica waived its right to challenge the amount in damages by its failure to challenge the accuracy of the calculation on the first appeal. For this reason alone, Comerica's argument that the calculation of individual driver net escrows contains some errors is also waived.

Second, Comerica never mentioned the alleged errors in the chart[1] submitted to this Court, at any time, for any reason, on any motion or other submission to the district court, including its post-trial proffer on damages. (Comerica Proffer, ECF No. 145).[2] This Court has consistently held that it will not review issues raised for the first time on appeal. *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006), citing *Barner v. Pilkington North America, Inc.*, 399 F.3d 745, 749 (6th Cir. 2005). "It is well settled law that this court will not consider an error or issue which could have been raised below but was not." *Barner*, 399 F.3d at 749, citing, *Niecko v. Emro Marketing Co.*, 973 F.2d 1296, 1299 (6th Cir. 1992); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990). This Court has explained that it "'will not decide issues or claims not litigated before the district court.... [W]e review the case presented to

[1] Comerica refers to the chart as a "spreadsheet" erroneously suggesting that the maintenance escrows for individual drivers were automatically calculated from the entries listed. There is no evidence in the record to support that suggestion, and Comerica cites nothing to this Court. Regardless, the district court did not rely on the chart to determine the damages in either the Arctic Litigation or in this matter. The district court repeatedly found that the Arctic Judgment Amount was accurate based upon the records maintained by Arctic. *OOIDA v. Comerica*, 615 F. Supp. 2d at 703 and n. 3.

[2] Comerica represents to this Court that it raised the "errors and inconsistencies" in its Offer of Proof, ECF No. 145, PageID# 6958-60 (Appellant's Brief at 57). That statement is incorrect. In fact, the pages cited never use those terms nor raise any issue regarding the accuracy of the damages calculation. The proffer argues only that the parties had an incentive to inflate the settlement amount because Arctic would not be responsible for paying the entire amount.

the district court rather than a better case fashioned after the district court's order.'" *Fuhr v. Hazel Park School District*, 710 F.3d 668, 676 (6th Cir. 2013) citing *Anchor Motor Freight*, 899 F.2d at 559.

The "chart" has been available to Comerica since the district court issued Provisional Order Approving the Class Settlement in May 2004. (*Arctic* ECF No. 204). As discussed exhaustively above, Comerica had actual notice and numerous opportunities to raise any alleged inconsistencies that might exist relating to individual driver net escrows. Despite repeated challenges to findings as to its responsibility for the Arctic Judgment, Comerica never raised alleged errors in the chart before the district court at any time. Comerica cannot raise the issue for the first time on this appeal. More fundamentally, Comerica's failure to raise on the first appeal the district court's finding as to the amount of damages in the 2009 Judgment, forecloses Comerica's challenge as to damages in all respects.

C. The Mandate Set the Legal Standard for Accrual of Plaintiffs' Claim Against Comerica and Remanded for a Factual Determination as to Plaintiffs' Reasonable Diligence

The district court correctly ruled that "the law governing Comerica's statute of limitations defense has been settled in this case for some time." (Final Judgment ECF No.155 Page ID# 7544). Comerica's statute of limitations defense is governed by the federal discovery rule. *In re Arctic Express I*, 636 F.3d at 802. The discovery rule delays *accrual* of a cause of action until the plaintiff has

discovered it. *Merck & Co. v. Reynolds,* 559 U.S. 633, 130 S. Ct. 1784, 1793 (2010). The district court found that "[i]n remanding the case, the Sixth Circuit stated that '[u]nder federal law the limitations clock *starts ticking* when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.'" (Final Judgment, ECF No. 155 PageID#7544, citing *In re Arctic Express I,* 636 F.3d at 802 (emphasis added)).

This Court has already decided that "[b]ecause the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run." *Id.* at 802. Throughout its brief, Comerica seeks to shift the burden of proof on its statute of limitations defense to Plaintiffs. Comerica repeatedly structures various arguments in terms of "tolling" the limitations period rather than "accrual" of the claim. From that erroneous starting point, Comerica proceeds to argue that Plaintiffs have failed to satisfy their burden of establishing facts which would "toll" the running of the statute. The district court correctly interpreted the mandate, and applied the standard set out by this Court accordingly. (Final Judgment ECF No.155 PageID#7544). The district court stated:

> As the Supreme Court recently stated in *Merck & Co. v. Reynolds*, "treatise writers now describe 'the discovery rule' as allowing a claim 'to *accrue* when the litigant first knows or with due diligence should know facts that will form the basis for an action,' " as opposed to the claim automatically accruing at the time Plaintiff is actually injured.

> 559 U.S. 633, 130 S.Ct. 1784, 1794, 176 L.Ed.2d 582 (2010) (quoting 2 Corman § 11.1.1, at 134).

(*Id.*, PageID# 7545 (emphasis added)). Consistent with the mandate in this case, the district court correctly concluded that "Comerica has the burden of proving that Plaintiffs 'discovered, or in the exercise of reasonable diligence should have discovered' their claim against Comerica prior to the statute of limitations cutoff."

This Court held that a determination of "reasonable diligence" is a factual question reserved for the trier of fact. *In re Arctic Express I*, 636 F.3d at 802. This Court thus affirmed the district court's rulings on Comerica's statute of limitations defense, holding that

> "reasonable minds could differ as to whether Plaintiffs exercised reasonable diligence in discovering facts giving rise to the claim against Comerica" and "[i]t is for a jury to decide whether Plaintiffs should have known of the need for inquiry into Arctic's relationship with Comerica over four years before Plaintiffs brought this suit, and therefore whether Plaintiffs' claims are barred by the statute of limitations."

Id., citing *OOIDA v. Comerica*, 615 F. Supp. 2d at 700. Comerica's statute of limitations defense was therefore remanded to the district court for a ***factual determination*** as to Plaintiffs' reasonable diligence in discovering the claim against Comerica.

III. THE DISTRICT COURT DID NOT ERR IN FINDING AS A MATTER OF FACT THAT COMERICA FAILED TO MEET ITS BURDEN TO PROVE ITS STATUTE OF LIMITATIONS DEFENSE

Comerica seeks reversal of the Final Judgment by fundamentally mischaracterizing Plaintiffs' claim against it and the injury resulting from its wrongdoing. Comerica takes the words of this Court out of context and broadly generalizes Plaintiffs' allegations to argue that Plaintiffs' claims against Arctic and the injury resulting from Arctic's wrongdoing are identical to that brought against Comerica. According to Comerica, Plaintiffs' injury in both cases is reduced to the same thing -- drivers lost their money. That being so, Comerica contends that since Plaintiffs knew they were injured when Arctic failed to return their maintenance escrow funds, they should have known that some unrelated third party took the funds. Comerica completely ignores the facts which disprove its thesis, and misstates the evidence introduced at trial, to conclude that every clue which might have come to Plaintiffs' notice, with the exercise of any diligence whatsoever, should have led Plaintiffs to the loan agreements and Comerica's transfer of the maintenance escrows out of Arctic's accounts at the same time they knew about Arctic's violation of the truth-in-leasing regulations.

This Court affirmed the district court's holding that the four year statute of limitations under Ohio Rev. Code § 2305.09 applies here. *In re Arctic Express I,* 636 F.3d at 802. The claims against Comerica were first filed on January 16, 2004.

Accordingly, the district court found that to prevail on its statute of limitations defense, Comerica was required to prove that "Plaintiffs knew, or in the exercise of reasonable diligence should have discovered, the *acts constituting the alleged violation*, prior to January 2000." (ECF No. 155 PageID# 7547(emphasis in original)). Events that took place subsequent to January 16, 2000 simply have no bearing on Comerica's statute of limitations defense. Remarkably, Comerica never mentions the statute of limitations cut-off date of **January 16, 2000** in its brief on this appeal.

Comerica's entire submission is structured to avoid the central element on which it had the burden of proof – evidence of some fact or event occurring prior to **January 16, 2000**, which reasonably would have alerted Plaintiffs to the need to inquire beyond Arctic and D&A's responsibility for the wrongful retention of Plaintiffs' maintenance escrow funds. The district court correctly found as a matter of fact that Comerica failed to carry its burden of proof on two levels. First, Comerica introduced no evidence to establish a triggering event sufficiently suggestive of wrongdoing that would prompt a reasonable person to make further inquiry; second, Comerica introduced no evidence demonstrating that a reasonably diligent plaintiff would have actually discovered the facts constituting Comerica's wrongdoing from facts available under the circumstances existing prior to the statute of limitations cut-off date.

A. Comerica Has Not Established that the District Court Committed Clear Error in Distinguishing the Claims against Arctic and Comerica and the Different Injury Resulting from the Distinct Wrongdoing of Each Defendant

Comerica states the wrong standard in arguing that a simple correlation of injury is sufficient to begin the statute of limitations running under the federal discovery rule. The district court correctly stated the standard as requiring the plaintiff "to act with reasonable diligence to discover '**both his injury and the cause of his injury.**'" (Final Judgment, ECF No.155 PageID#7545, citing *Campbell v. Grand Trunk Western R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)(emphasis added)).

Applying that standard, the district court correctly ruled that the claims against Arctic and Comerica were different claims; and that the acts constituting the alleged violations were therefore distinct. (Final Judgment, ECF No.155 PageID#7548). "Plaintiffs are not suing Comerica under the ICCTA. Plaintiffs bring an action for restitution under the federal common law of trusts." *Id.* The district court correctly ruled that the acts which establish a violation of the escrow provisions of the leasing regulations are distinct from the acts necessary to prove that Plaintiffs' rights in their trust property were breached by the dissipation of the funds through the wrongful transfer to a third party by operation of a loan agreement. *Id.* The district court did not err in finding that Plaintiffs' injury at the hands of Arctic was known when Arctic failed to return the maintenance escrows

within 45 days as required by 49 C.F.R. § 376.12(k)(6); but that Plaintiffs would not have been aware of the distinct injury of the dissipation of their funds until they had reason to know that the escrow funds had been transferred into Comerica's control in breach of the statutory trust. *Id.*

> Before they knew or had reason to know that the maintenance escrow funds were dissipated into Comerica's accounts pursuant to the loan arrangement, Plaintiffs would not have been apprised of the factual basis forming their injury. *Kennedy [v. City of Zanesville,]* 505 F. Supp. 2d 456, 489 [(S.D. Ohio 2007)]. The statute of limitations, therefore, did not begin to run until they had reason to know the funds were in Comerica's control.

Id.

Comerica takes exception with the district court's findings, but other than the simplistic statement that Plaintiffs sought the ultimate return of their maintenance escrows, Comerica provides no support for the contention that the acts underlying Plaintiffs' claims and resulting injury in the two actions are the same. Comerica cites this Court's finding that "Arctic breached its trust obligations by encumbering the escrow funds, and dissipating trust assets, <u>through its lending relationship with Comerica</u>." (Appellant's Brief at 28, emphasis in original). But Comerica never explains how this finding demonstrates an identity of claim and injury between the Arctic and Comerica cases. Quite to the contrary, the full context of this Court's findings as to Comerica's liability for disgorgement of Plaintiffs' trust property, highlights the distinction between Comerica's conduct

and Arctic's conduct. Arctic was responsible for returning Plaintiffs' maintenance escrows as required by 49 C.F.R. § 376.12(k), but failed to draw on its line of credit to do so. *In re Arctic Express I*, 636 F.3d at 801. Comerica had no responsibility to Plaintiffs under the leasing regulations. Instead,

> By operation of the loan agreements, **Comerica collected** the nine cents per mile in maintenance escrows along with Arctic's receivables and, in **sweeping** Arctic's cash collateral account, **used** the maintenance escrows to repay amounts borrowed by Arctic under the loan agreements. Consequently, Arctic breached its trust obligations to plaintiffs by encumbering the escrow funds, and dissipating the trust assets, through its lending relationship with Comerica. Comerica must therefore disgorge the trust property **received** in breach of trust…

Id. (emphasis added).

On this same theme, Comerica asserts that the district court erred in finding different claims because the allegations in the Complaint filed in the Arctic Litigation in June 1997 and the original Complaint filed against Comerica in January 2004 both allege the same acts -- recovery of the maintenance escrows. (Appellant's Brief at 28 and 30). First, that allegation is not an act, but a remedy. Further, Comerica just ignores what it does not want the Court to see. The Arctic Complaint alleges violations of 49 C.F.R. § 376.12(k). (ECF 177-1, PageID#7801-03)**.** The Adversary Complaint specifically seeks recovery of the escrow funds ***transferred to Comerica*** pursuant to certain loan agreements between Arctic and Comerica Bank. (Opp. Comerica S.J., ECF No. 58, Exh. C, PageID#1783).

Comerica contends that a ruling in the Arctic case finding that Plaintiffs' claims for breach of fiduciary duty against *Arctic's officers* accrued at the same time as their leasing regulation claims, should be held to demonstrate that the claims against Comerica also accrued at the same time. But the district court's opinion on that motion only serves to further highlight the distinction between the Arctic and Comerica cases. The district court found that the injury incurred in Arctic was defined by the violation of the leasing regulations. (Arctic ECF No. 152 at 9, 12): "The Defendants' wrongful retention of the escrow maintenance funds occurred when the Defendants failed to return those funds within forty-five days of the termination of the Plaintiffs' respective leases, as is required by 49 C.F.R. §376.12(k)." *Id*. at 9.

Arctic was found liable for violation of the leasing regulations; the reach of those provisions does not extend to regulation of Comerica's conduct under its loan agreements. Independent from Arctic's liability under 49 C.F.R. § 376.12(k), Comerica is liable for wrongfully transferring to itself, and dissipating, the trust funds under the federal common law of trusts through the operation of the loan agreements. Arctic was liable for the return of $5,583,084 because that was the amount that it unlawfully withheld in violation of 49 C.F.R. § 376.12(k). Comerica is liable for the disgorgement of that same amount because that is the amount in trust property that was wrongfully transferred by operation of the loan

agreements. The Arctic and Comerica Litigations are two separate actions; the claims in the cases are different; the injuries inflicted as a result of the two distinct wrongs are not the same. The district court did not err in finding, as a matter of fact, that Comerica did not meet its burden to establish that Plaintiffs' knowledge of Arctic's failure to return their maintenance escrows in violation of the leasing regulations alerted Plaintiffs, or in any way put Plaintiffs on notice, of the dissipation of their trust funds by operation of a loan arrangement between Arctic and Comerica.

B. Comerica Has Not Established that the District Court Committed Clear Error In the Factual Conclusion that Comerica Failed to Prove Plaintiffs Lack of Diligence in the Discovery of their Claim

Comerica does not cite to any evidence which demonstrates Plaintiffs' knowledge of Arctic's finances or credit relationships prior to **January 16, 2000**. The evidence introduced at trial established that: Arctic/D&A were the parties with which drivers had their contractual relationship; which collected the nine cents per mile; which created the maintenance fund; which refused to return the unused balance in their maintenance fund when the lease agreements terminated; and which could be held responsible under the ICCTA. The record shows that prior to the statute of limitations cutoff date, Plaintiffs knew of their injury resulting from Arctic's violation of the leasing regulations. Comerica points to no evidence

before January 2000 which would prompt inquiry into Arctic's financing relationships.

Comerica argues that Plaintiffs' knowledge that Arctic had retained their maintenance escrow funds was sufficient to require Plaintiffs to investigate every possible avenue of inquiry, regardless of the absence of any circumstance making such inquiry reasonably necessary. Comerica's contention goes far beyond even the narrow standard found in the few cases it cites, where at least the knowledge of wrongdoing is required before a duty to inquire is triggered. *See Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.*, 755 F.2d 1231, 1237 (6th Cir. 1985)(under Ohio law, information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a duty to inquire); *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991)(cause of action accrues when some event should have alerted typical lay person to protect his rights).

Comerica misstates the standard of diligence actually applicable. The district court, affirmed by this Court, held that the federal discovery rule does not require the examination of every document available; reasonable diligence requires inquiry only where some fact or circumstance directs attention in that channel in which it would be successful. (Final Judgment, ECF No. 155 PageID#7549, citing 615 F. Supp. 2d at 700-01; *Michigan United Food and Commercial Workers Unions and Drug and Mercantile Employees Joint Health and Welfare Fund v.*

Muir Co., Inc., 992 F.2d 594, 598 (6th Cir. 1993). The Supreme Court recently held that under the discovery rule, the accrual of a cause of action is not triggered at "the point at which a plaintiff possesses a quantum of information sufficiently suggestive of wrongdoing that he should conduct a further inquiry." *Merck*, 130 S. Ct. 1784, 1797 (2010). Rather, under the discovery rule "the limitations period does not begin to run until the plaintiff thereafter discovers, or a reasonably diligent plaintiff would have discovered, *the facts constituting the violation. . .*" *Id*. (emphasis added). *See also, New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500-501 (6th Cir. 2003). Reasonable diligence is just that, a reasonable effort to discover *the cause of an injury* under the facts and circumstances present in the case**.**" *Debiec v. Cabot Corp*., 352 F.3d 117, 129 (3d Cir. 2003)(emphasis added).

Comerica cites to evidence that in September 1997, Plaintiffs received information that OOIDA members were investigating Arctic's maintenance fund retention practices. The district court ruled that based upon this evidence diligent counsel would have been prompted to obtain knowledge, ***to the extent possible***, of Arctic's maintenance fund retention practices. (Final Judgment, ECF No.155, PageID#7542). Comerica asserts that this information put Plaintiffs on "inquiry notice" that they needed to protect their rights. The district court noted that "the term 'inquiry notice' refers to the point where the facts would lead a reasonably

diligent plaintiff to investigate further." (*Id.* PageID# 7550, citing *Merck*, 130 S. Ct. at 1797).

Applying the standard for "reasonable diligence" while giving Comerica the benefit of the doubt on "inquiry notice," the district court correctly found that Comerica failed to meet its burden of proving that Plaintiffs should have discovered the lending arrangement between Arctic and Comerica and the acts constituting the violation of the statutory trust over the maintenance funds **prior to the statute of limitations cutoff date of January 16, 2004.** (Final Judgment, ECF No. 155 PageID#7549 and 7564). The district court carefully considered the evidence in great detail, and rejected the arguments now offered by Comerica on this appeal.

1. The District Court Did Not Commit Clear Error in Concluding that Nothing in the Public Record Would Have Alerted Plaintiffs to the Financing Arrangements Between Arctic and Comerica

Comerica repeatedly overstates the district court's findings regarding information known to Plaintiffs and information on the public record regarding the "banking" relationship between Arctic and Comerica. Further, Comerica just plain ignores evidence which contradicts its contention that Plaintiffs could have easily uncovered the lending relationship from public sources with the slightest effort.

Comerica first asserts that compensation checks issued to owner-operators were produced in discovery in August 1998. The checks were drawn on an Arctic

account at Comerica Bank. Comerica argues that the document production included driver settlement statements attached to the checks which showed the actual deduction for the maintenance escrows retained from drivers. Comerica concludes that the checks and corresponding settlement statements should have alerted Plaintiffs to investigate further. However, Comerica introduced into evidence no fact or circumstance which would have made this information meaningful beyond payment of driver net compensation. There was no information on the check or included in the driver settlements that disclosed that Arctic had a revolving credit loan with Comerica, that any entity other than Arctic had control over Plaintiffs' escrow funds, or that Arctic was using the maintenance escrows to reduce its loan balance. (Final Judgment, ECF No. 155, PageID#7555-56). These are the same checks that both the district court and this Court stated: "[a]s the checks themselves do not reveal that Comerica was holding or using Plaintiffs' maintenance escrow funds, it is questionable whether these checks put Plaintiffs on notice that Comerica might have these funds." *In re Arctic Express I*, 636 F.3d at 802; *OOIDA v. Comerica Bank*, 615 F. Supp. 2d at 700-01. With respect to this statement, the district court concluded that "it decides now as a finder of fact" that the information on the checks is "insufficient to prompt further diligence toward investigating the lending arrangement between Comerica and Arctic." (Final Judgment, ECF No.155 PageID#7556). Comerica identifies no

additional information contained on the settlement statements which would reveal any fact relating to any kind of lending relationship. The district court correctly found that: "To the extent that Plaintiffs were on inquiry notice to investigate the security of the maintenance funds, … the disclosure of the checks still would not have reasonably prompted Plaintiffs to direct inquiry toward Comerica, specifically, or exercise more diligence than they were able to as of August 1998." *Id.* Comerica can demonstrate no clear error by the district court in reaching this conclusion.

Significantly, Comerica wrongly states as fact, that UCC statements perfecting a security interest in Arctic's accounts receivable, publicly revealed the lending relationship with Comerica. (Appellant's Brief at 39). Comerica completely ignores the findings of the district court to the contrary, and the testimony at trial from its own witness. The district court found that Comerica did not specifically identify "escrow funds" or "maintenance escrow funds" in its UCC Financing Statement; none of the loan agreements, the security agreements, or the revolving credit loan agreements between Comerica and Arctic was publicly filed; Comerica's own witness at trial did not believe that the maintenance escrow funds at issue were part of Arctic's account receivables pledged as collateral for Comerica's loan to Arctic, or that the maintenance escrow funds were "eligible accounts" under the loan agreements. (Final Judgment, ECF No.155

PageID#7514.) The district court found that the mere fact of a security interest would not be sufficient to prompt further inquiry as they did not reveal details of the mechanics of the revolving credit lending relationship between Arctic and Comerica which involved the transfer of the maintenance escrow funds. (*Id.*, PageID##7553-54). The district court explained that "the mere existence of a bank's holding a security interest in Arctic's account receivables does not even constitute 'storm warnings' of potential wrongdoing." (*Id.*, PageID#7554, citing *Isaak v. Trumbell S&L Co.*, 169 F.3d 390, 399 (6th Cir. 1999). The district court correctly concluded, as a matter of fact, that "learning that Comerica had a lien on Arctic's accounts receivables would not be enough to put Plaintiffs on reasonable notice that Comerica actually held the maintenance escrow accounts. As Comerica's own expert's admission indicates, it may not even have been enough to alert a reasonable plaintiff that the maintenance escrows were encumbered at all." (*Id.)*

The district court correctly rejected Comerica's unsupported contention that the mere mention of the identity of Comerica in connection to a checking account, even coupled with the publicly available information that Comerica had a security interest in Arctic's "accounts receivable," was sufficient to reasonably prompt Plaintiffs to exercise more diligence toward an inquiry into the possibility of the

wrongful transferring of the escrows out of Arctic's control. (*Id.*, Page ID#7554, 7556). No clear error has been shown as to this finding.

2. The District Court Did Not Commit Clear Error In Finding that Discovery Orders in the Arctic Litigation Stymied Plaintiffs' Efforts to Learn About Arctic's Finances

There is no dispute that Plaintiffs attempted to discover financial and banking information from Arctic through the normal channels of discovery available to Plaintiffs under federal court procedure. Comerica quibbles with certain edits[3] to the discovery requests actually served, stating that Plaintiffs could have obtained even more revelatory information had they not pared down the requests. (Appellant's Brief at 14, 38). Comerica makes no argument that the edited version neglected any required diligence in discovering the claim against Comerica. Comerica does however falsely represent that the requested information was publicly available through a UCC search. *Id.* As discussed above, "where the trust funds were deposited" was not information published on the UCC statements.

The district court held that Plaintiffs' properly directed diligence, evidenced by the discovery requests, was frustrated, through no fault of the Plaintiffs, by orders issued by the district court in the Arctic case. (Final Judgment, ECF No.155 PageID#7557). In December 1997, the Magistrate Judge limited discovery to

[3] Comerica was granted extraordinary discovery into Plaintiffs' Counsel's work product, including all drafts of pleadings, motions and discovery materials. (ECF No. 84).

"class issues." "Plaintiffs were barred from seeking merits discovery." (*Id.*, PageID#7557-58). Plaintiffs served discovery seeking Arctic's financial information in February 1998, and the district court concluded that in June 1998 the Magistrate properly sustained Arctic's objection to Plaintiffs' discovery requests, and further severely limited the subject areas for interrogatories and the specific documents allowed in the production of documents. (*Id.*, PageID#7558). On August 17, 1998, the district court entered a stay of all proceedings pending resolution of appeals in the Sixth and Eighth Circuits challenging the private right of action under the ICCTA. *Id.* The stay was not lifted until March 3, 2000, after the January 16, 2000 statute of limitations cutoff date.

Comerica again raises its "tolling" argument, asserting that a statute of limitations is not tolled by a stay of discovery. But Comerica misconstrues the district court's findings. The district court did not find that it would be "unfair" to refuse to toll the statute of limitations; but that Plaintiffs had exercised reasonable diligence under the circumstances in trying to find out about any potential cause of action from Arctic, and through no fault of their own, were prevented from discovering the relationship between Arctic and Comerica. (*Id.*, PageID#7560). The district court concluded: "In retrospect, the Court finds that Plaintiffs could not have discovered the injurious transfer of the maintenance funds even through

reasonable diligence, which they attempted, prior to the lifting of the stay in the case." (*Id.*)

Comerica raises two additional points without support. Comerica takes a swipe at the district court's finding that Plaintiffs acted with reasonable timeliness in their service of discovery, noting that it is not reasonable to require the preparation of discovery in the two to three months before the Magistrate's limiting Order. Comerica provides no support for its objection to the finding, rather it chooses to mock the district court's use of the term "unfair". (Appellant's brief at 41). In fact, Plaintiffs were precluded by Rule 26(d) and (f), Fed. R. Civ. P., from seeking discovery "from any source" prior to the initial pretrial conference. The Magistrate's December 18, 1997 Order limiting discovery indicated that that was the conference was held on December 17, 1997. (Arctic ECF No. 22).

Comerica further contends that Plaintiffs could have investigated sources outside the confines of the litigation, like UCC lien searches and Dun & Bradstreet reports. The district court properly rejected these contentions. As discussed, the district court correctly found that a UCC lien search would not have revealed any information about the operation of the loan arrangements or which would have prompted further inquiry into Arctic's finances. As to a Dun & Bradstreet report, the district court found that no such report was offered in evidence and so the court

could not determine what information regarding Arctic and its credit relationship with Comerica might have been revealed in such report. (Final Judgment, ECF No. 155, PageID#7526, n.9).

3. The District Court Did Not Commit Clear Error in Rejecting Other Evidence as Failing to Prove Comerica's Statute of Limitations Defense

Comerica lists several events which it contends demonstrate that Plaintiffs did not act with reasonable diligence in discovering their claim. (Appellant's Brief at 35-36). Comerica makes no argument as to how any of these events would have alerted Plaintiffs to the need to investigate the security of their maintenance escrows. Comerica offers no fact, or even suggestion, as to how any of these events would lead to the discovery of any financing arrangements with Comerica or the operation of any such lending agreement. Comerica simply makes its list and then repeats its pervasive, strident, and unsupported allegation that Plaintiffs engaged in no diligence in discovering their claim against Comerica.

The Durst/Abel lawsuit. The co-founders of Arctic were involved in a lawsuit in 1996 in which one partner alleged that the other was in possession of all the property owned by Arctic. Comerica introduced no evidence in the district court related to this lawsuit supporting its assertion that the occurrence of this shareholder dispute posed any threat to Arctic's solvency or Plaintiffs' maintenance escrows. Comerica points to no such evidence on this appeal. The

district court correctly found that "this event would not have done anything to alert Plaintiffs to the existence of Comerica's lending arrangement with Arctic." (Final Judgment, ECF No.155 PageID#7562).

Information from Arctic's Maintenance Fund Supervisor. The district court found that no evidence that any such information ever existed. (*Id.* PageID#7542-43). Again, Comerica makes no argument supporting any contention that Plaintiffs' lacked diligence in their inquiry as a result of this unidentified information.

Post January 16, 2000 Events. The district court correctly found that events occurring after the statute of limitations cut-off date were irrelevant to determining Plaintiffs' diligence because even if any of the events would have been sufficient to trigger Plaintiffs' investigation, any information learned would have been inside the four year window prior to bringing suit. (*Id.*, PageID#7551). The district court rejected Comerica's assertion that the post January 2000 events demonstrate Plaintiffs' continued lack of diligence. The district court found that under the discovery rule, "in order for Plaintiffs' claim to be time-barred, there must have been a sufficient reason prior to January 2000 that would have awakened a reasonably diligent plaintiff to inquire into Arctic's treatment of the maintenance escrow funds." (*Id.* PageID#7552). The district court properly concluded that "analysis of whether circumstances would have prompted Plaintiffs

to exercise diligence ends with the cutoff date of January 16, 2000." (*Id.*). Comerica has not demonstrated that the district court committed clear error in rejecting evidence of events occurring after the statute of limitations cutoff date.

IV. COMERICA HAS NOT SHOWN THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN CALCULATING PREJUDGMENT INTEREST USING THE PRIME RATE

Comerica argues that the district court awarded an excessive amount in prejudgment interest. Comerica's only basis for its contention relies on the same error asserted throughout its Appellant's Brief -- that Arctic is the real wrongdoer. Comerica argues that since Arctic is the actual wrongdoer, interest should be calculated as if the award were for post judgment interest measured from the date of the Arctic Judgment. Comerica contends that it should not be required to pay in prejudgment interest, anything more than Arctic would have been required to pay under 28 U.S.C. § 1961. As established above, Comerica has been found liable for the $5,583,084 based on its own conduct in wrongfully transferring trust property under the loan agreements.

The district court correctly found that prejudgment interest must be calculated "to compensate a [party] for the lost interest value of money wrongly withheld from him or her." (Amended Judgment, ECF No. 171, PageID#7747, quoting *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2000). The district court properly recognized Plaintiffs' action to recover their property from

Comerica had been pending for more than eight years, that Plaintiffs had been deprived of the use of their funds for that period, and that Comerica had the benefit of those funds. (ECF No. 171, PageID#7748). The district court accordingly found that this case is "precisely the type of case in which an award of prejudgment interest is not merely appropriate, but necessary to prevent manifest injustice." *Id.*

The district court noted that this Circuit has "upheld awards of prejudgment interest that were tied to prevailing market rates, thus reflecting what the defendants would have had to pay in order to borrow the money at issue." (*Id.*, PageID#7749, quoting *Rybarczyk*, 235 F.3d at 986). The court therefore held that the Prime rate was the appropriate rate to apply here as it was "the prevailing market rate for lending to the lowest risk customers." (ECF No. 171, PageID#7750). Having found Plaintiffs' methodology for the calculation of prejudgment interest at the Prime rate to be sound, the district court awarded Plaintiffs $2,647,330.62.

Comerica makes no argument challenging the district court's discretionary award to Plaintiffs beyond its baseless assertion that as an innocent party it should not be required to pay more than the actual wrongdoer would have had to pay in post judgment interest. Comerica has not met its burden to demonstrate an abuse of discretion. The district court's award of prejudgment interest calculated at the Prime rate should be affirmed.

CONCLUSION

For all the foregoing reasons, and the entire record in this matter, this Court should affirm the Amended Final Judgment in favor of Plaintiffs in the amount of $5,583,084 in damages plus $2,647,330.62 in prejudgment interest.

Respectfully submitted,

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Dated: July 31, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) in that the brief contains 12, 548 words excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/Joyce E. Mayers
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Dated: July 31, 2013

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 28(b)(1)(A)(i), Plaintiff-Appellee Owner-Operator Independent Drivers Association, Inc., et al., has designated the following docket entries:

OOIDA v. Comerica Bank Case No. 2:05-cv-00056	**Description**
ECF No. 54	Defendant Comerica Bank's Motion for Summary Judgment(PageID#357)
ECF No. 58	Plaintiffs' Opposition to Comerica Bank's Motion for Summary Judgment(PageID#1710)
ECF No. 58-3	Exhibit C (PageID#1768)
ECF No. 61	Defendant Comerica Bank's Reply in Support of its Motion for Summary Judgment (PageID#1866)
ECF No. 84	Order (PageID#2241)
ECF No. 145	Defendant Comerica Bank's Offer of Proof Related to Damages(PageID#6956)
ECF No. 146	Transcript of Trial Proceedings (PageID#7132)
ECF No. 152	Order and Opinion (PageID#7433)
ECF No. 155	Final Judgment (PageID#7507)
ECF No. 171	Amended Judgment (PageID#7744)
OOIDA v. Arctic Express Inc Case No. 2:97-cv-750	**Description**
ECF No. 22	ORDER by Mag. Judge Norah M. King, 12/18/1997
ECF No. 152	ORDER by Judge Algenon L. Marbley granting Dfts' Durst and Russi's Motion to Dismiss, 01/29/2003
ECF No. 199	Order Resetting Trial Date and Settlement Conference
ECF No. 202	Order Resetting Settlement Conference
ECF No. 201	Order 05/15/2004
ECF No. 203	Application for Approval of Class Settlement and Settlement Distribution Plan
ECF No. 204	Provisional Order Approving Class Settlement and Settlement Distribution Plan

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2013, I caused the foregoing Brief of Appellees' to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of electronic filing to the following:

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